THE NEW INSOLVENCY, RESTRUCTURING AND DISSOLUTION BILL

On 10 September 2018, the Insolvency, Restructuring and Dissolution Bill (the "Bill") was tabled for its first reading in Parliament. On top of bringing Singapore's currently-disparate bankruptcy and insolvency provisions under one omnibus legislation, several interesting new provisions have been proposed as part of a holistic update of Singapore's insolvency and restructuring laws.

Key issues

- The operation of *ipso facto* clauses in most contracts (with some exceptions) will be restricted during the course of formal rehabilitative processes
- A new "out-of court" method to place a company under judicial management will be available
- The powers of liquidators and judicial managers will be enlarged to permit them to assign the proceeds of certain actions instituted to recover monies or assets for the distressed company. This facilitates liquidators and judicial managers in obtaining third-party funding for such actions
- A new licensing and regulatory regime for insolvency practitioners will be established
- Rules governing the electronic delivery of documents and notices will be introduced

INTRODUCTION

The Bill proposes to consolidate Singapore's insolvency laws for both personal bankruptcy and corporate insolvency under a single piece of "omnibus" legislation. These provisions are currently split between the Companies Act (Cap 50) and the Bankruptcy Act (Cap 20).

On top of its consolidating function, the Bill also introduces some new provisions inspired by insolvency legislation from other Commonwealth jurisdictions. Some of the more interesting proposed additions include:

- restrictions on the operation of contractual ipso facto clauses when judicial management or a scheme of arrangement is afoot;
- institution of judicial management without having to obtain a court order;
- enhancing the availability of third-party funding in the context of insolvency proceedings;
- a regulatory regime for insolvency practitioners; and
- electronic delivery of documents or notices in insolvency proceedings

RESTRICTIONS ON OPERATION OF *IPSO FACTO* CLAUSES

Ipso facto clauses are clauses which allow a contract to be *automatically* terminated or changed when a specified trigger event (usually the restructuring or insolvency of a contracting party) occurs. Section 440 of the Bill, inspired by a similar Canadian statutory provision, seeks to restrict the operation of such clauses when rehabilitative processes (such as judicial management and scheme of arrangements) are afoot.

Restrictions

Subject to the classes of exceptions listed below, at any time after the commencement, and before the conclusion, of any judicial management or scheme of arrangement proceedings, no person may *by reason only that the proceedings are commenced against a company or that the company is insolvent*:

- terminate any agreement with the company;
- amend any agreement with the company;
- claim an accelerated payment or forfeiture of the term under any agreement with the company; and
- terminate or modify any right or obligation under any agreement with the company.

The above restrictions are expressly stated to be applicable to security agreements with the company as well.

For the avoidance of doubt, Section 440(2) clarifies that the restrictions neither prevents (i) a drawstop; nor (ii) a person from requiring payments to be made on cash terms for goods, services and other valuable consideration provided *after* the commencement of the relevant proceedings.

No contracting out

Section 440(3) expressly renders ineffective any agreement providing for, or permitting, anything that is contrary to the restrictions described above.

The main argument for the statutory restriction on *ipso facto* clauses is that allowing counterparties to terminate key commercial contracts with a distressed company would undermine any attempt to save the company as a going concern.

Significant financial hardship

The Court may exempt a contract counterparty from the Section 440 restrictions if the counterparty can show that the restrictions will likely cause it *significant* financial hardship. From the guidance afforded by Canadian jurisprudence, this requirement is likely to go beyond economic or financial loss *per se*, and examine whether the individual characteristics and circumstances of the counterparty enable it to absorb the resultant losses from the suspension of its rights.

Exceptions

By virtue of a carve-out contained at Section 440(5), *ipso facto* clauses will continue to be permitted to operate in the following classes of contracts:

- Eligible financial contracts as may be prescribed by further legislation;
- Licenses, permits or approvals issued by the Government or a statutory body;
- Prescribed contracts which are likely to affect the national interest or economic interest of Singapore;
- Commercial charters of ships;
- Agreements within the meaning of the Cape Town Convention on International Interests in Mobile Equipment; and

- Prescribed agreements which are the subject of treaties to which Singapore is party.

For now, there has been no further subsidiary legislation tabled prescribing what are "eligible financial contracts". The position in Canada (from which Section 440 was derived) suggests that "eligible financial contracts" may include derivatives agreements, securities lending agreements, repurchase agreements and other related agreements.

JUDICIAL MANAGEMENT WITHOUT A COURT ORDER

Section 94 of the Bill introduces a new process by which creditors may place a company under judicial management without having to apply to court.

Under the new process, this may be achieved through a simple majority of creditors (in number and in value) present and voting at a meeting held at a time and place convenient to the majority in value of the creditors.

However, a floating charge holder who is entitled to appoint a receiver and manager of substantially the whole of the company's property retains his/her right to veto such an attempt to place the company under judicial management.

It is worth noting that this out-of-court process will require certain statutory declarations to be lodged by (i) the proposed interim judicial manager and (ii) the company's directors, who may be punished with imprisonment and a fine if any false statement is made in his/her statutory declaration.

THIRD-PARTY FUNDING

The powers of liquidators and judicial managers will be enlarged, via Section 144(1)(g) and paragraph (f) of Schedule 1 of the Bill respectively, to permit them to assign the proceeds of certain actions that may be instituted to recover monies or assets for the distressed company (in accordance with regulations to be further prescribed).

In the Explanatory Statement to the Bill, this new power is expressed to facilitate a liquidator or a judicial manager (as applicable) in obtaining third-party funding for the actions to recover monies or assets for the distressed company.

REGULATORY REGIME FOR INSOLVENCY PRACTITIONERS

Sections 47 to 60 of the Bill establishes a new licensing and regulatory regime for "insolvency practitioners".

The regime will allow regulators to ensure that only qualified, "fit and proper" persons act as "insolvency practitioners", and to impose conditions on particular "insolvency practitioners" when granting or renewing a licence.

A disciplinary framework has also been put in place to punish errant office holders.

However, Section 47(2) of the Bill provides that the following roles may be performed by persons who are not licensed "insolvency practitioners:

- a liquidator appointed in a members' voluntary winding up; and
- a scheme manager appointed in relation to a scheme of arrangement.

ELECTRONIC DELIVERY OF DOCUMENTS

In this information and technology age, it is not uncommon for documents and notices to be delivered electronically instead of in paper form. Sections 441 to 444 of the Bill sets out rules in respect of delivery by electronic means as well as through Internet websites.

It must be noted that electronic delivery does not apply to the issuance of a statutory demand or a written demand, which can form the basis of a bankruptcy or winding up application if unsatisfied.

CONCLUSION

The above observations remain necessarily tentative. The Bill is yet to be read a second time and debated in Parliament, which leaves open the possibility that certain provisions may be substantially amended before the Bill is passed as law.

Nevertheless, given the length of time which has been dedicated to the general review of Singapore's insolvency laws, and the speed at which the first two phases of insolvency law amendments (in the form of the Bankruptcy (Amendment) Act 2015 and the Companies (Amendment) Act 2017) were passed, it is likely that the Bill will be passed with minimal changes in the near future.

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